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No. 90-1649

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FERNANDO ROJAS,

Petitioner,

—against—

ALEXANDER'S DEPARTMENT STORE, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CASES AND AUTHORITIES	ii
I. The Contention that there was No Pleading or Proof Below of the Theory of *Respondeat Superior*	2
II. The Contention that the Only Evidence before the Jury was Discrimination against Petitioner Because he was Hispanic	7
CONCLUSION	14

TABLE OF CASES AND AUTHORITIES

Cases	Page
Classon v. Shopko Stores, Inc., 435 F. Supp. 1186 (E.D. Wis. 1977)	4
Draeger v. Grand Central, Inc., 504 F. 2d 142 (10th Cir. 1974)	4
Estate of Iodice v. Gimbels, Inc., 416 F. Supp. 1054 (E.D.N.Y. 1976)	4
Ibarra v. Las Vegas Metropolitan Police Department, 572 F. Supp. 562 (D. Nev. 1983)	4
Iskander v. Village of Forest Park, 690 F. 2d 126 (7th Cir. 1982)	4
Monnell v. Department of Social Services of the City of New York, 436 U.S. 658 (1987)	2, 4

Cases	Page
Polk County v. Dodson, 454 U.S. 312 (1981)	5
Powell v. Shopco Laurel Co., 678 F. 2d 504 (4th Cir. 1982)	4
Shepard v. Byrd, 581 F. Supp. 1374 (N.D. Ga. 1984)	4

Authorities	
42 U.S.C. §1983	3, 4, 7

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Neither of the two counter-questions posed to this Court by Respondent are an answer to the points raised by Petitioner in his petition, nor do they accurately reflect the issues before this Court.

I

The Contention that there Was No Pleading or Proof Below of the Theory of *Respondeat Superior*

Respondent contends that this Court should not consider this case to review whether *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1987) applies to private corporations to prevent recovery on the basis of *respondeat superior* because "Petitioner did not present this case on a *respondeat superior* theory."

On the contrary, Petitioner did argue to the trial court that he should have recovery on the basis of Respondent's vicarious liability for its employees' tort. But when the Respondent moved to dismiss an earlier complaint which based liability on this premise, the trial court ruled on that issue and rejected it. Thus plaintiff was barred

from urging this theory of recovery in his Second Amended Complaint. It would have been an idle gesture for Petitioner's counsel to challenge the trial court's submission to the jury of the two-step verdict.

Although the trial court initially said it was not deciding this issue because this Court and the Second Circuit had not ruled, it took *respondeat superior* out of consideration in this case when it ruled that plaintiff had another basis for claiming defendant's liability under §1983 -- the claim that defendant had a policy of discriminating against blacks and hispanics in making arrests -- which, "if true, would suffice." The record establishes the clarity with which plaintiff was deprived of any contention of vicarious liability. *viz.*

"Absent a conspiracy, however, there remains an issue whether Alexan-

der's can be held vicariously liable for its employee's actions. Most courts that have addressed this point have held that a corporate employer is not liable under section 1983, on a theory of *respondeat superior*, for the constitutional torts of its emplyees. See, e.g., *Iskander v. Village of Forest Park,* 690 F. 2d 126, 128-129 (7th Cir. 1982); *Powell v. Shopco Laurel Co.,* 678 F. 2d 504 (4th Cir. 1982); *Draeger v. Grand Central, Inc.*, 504 F. 2d 142, 145-146 (10th Cir. 1974); *Ibarra v. Las Vegas Metropolitan Police Department*, 572 F. Supp. 562 (D. Nev. 1983); *Shepard v. Byrd.* 581 F. Supp. 1374, 1389-90 (N.D. Ga.1984); *Estate of Iodice v. Gimbels, Inc.,* 416 F. Supp. 1054 (E.D.N.Y.1976). But see *Classon v. Shopko Stores, Inc.*, 435 F. Supp. 1186 (E.D. Wis. 1977). The majority viewpoint relies heavily on the line of cases that culminated in the Supreme Court's decision in *Monell v. Department of Social Services*, 436 U.S.658 (1987), and which held that 'a municipality cannot be held liable under §1983 on a *respondeat superior* theory.' *Id.* at 691. Neither the Supreme Court nor the Second Circuit appear to have addressed directly the issue of whether a private corporate employer may be held liable under section 1983 on a *respondeat superior* theory.

"The court does not decide this issue. Even if the doctrine of *respondeat superior* does not apply to section 1983 actions at all, plaintiffs, particularly in their papers in support of their motion to amend the complaint have alleged that it was defendant's unstated policy to arrest more readily on suspicion of shoplifting those customers who

were black or hispanic." This allegation if true, would suffice to meet the requirements that a plaintiff show that official policy is the moving force behind the constitutional violation. See *Polk County v. Dodson,* 454 U.S. 312, 326 (1981). Plaintiff Fernando Rojas is entitled to an opportunity at trial to prove the existence of such a policy." (A-50-51)

By barring the plaintiff from proceeding on a theory of *respondeat superior*, the trial court in effect decided it against Petitioner. Its ruling made crystal clear that the trial court would not submit the case to the jury on that theory. The court thus left the Petitioner with but one theory of recovery -- that based on his contention that Alexander's Department Store had "an unstated policy to arrest more readily on suspicion of shoplifting those customers who were black or hispanic." Later, as discussed in II below, the trial court deprived the plaintiff of this issue as it concerned skin color and submitted the

case to the jury on the narrow question of whether Defendant had an illegal policy or practice of discrimination against persons whom its employees, on sight, believed to be hispanic.

The Plaintiff-Petitioner thus became the victim of a trial court's preliminary ruling that he could not advantage himself of his constitutional right not to be arrested without probable cause by Defendant employer corporation acting through its employees.

The issue was thus not only drawn in Plaintiff's pleadings, it was addressed by the trial court in its preliminary decision on this issue and adhered to when the court submitted its bifurcated interrogatory verdict to the jury.

Further, the Court of Appeals below made clear that it had considered the issue decided and gave the decision made

by the trial court in its preliminary opinion a ringing affirmance. That court said:

"...to recover under §1983, it is not enough for Rojas to show that his arrest by Luck was without probable cause. He must show that Alexander's had a policy of arresting shoplifting suspects on less than probable cause. The mere fact that the jury determined in the first interrogatory that there was no probable cause to arrest the plaintff is insufficient to warrant a judgment against Alexander's because the jury found that Alexander's did not have a policy of arresting Hispanic shoplifting suspects on less than probable cause.

The issue could not have been more clearly raised in the trial court.

II

The Contention that the Only Evidence before the Jury was Discrimination against Petitioner Because he was Hispanic

Petitioner at trial presented powerful circumstantial evidence of the discriminatory practice of Alexander's concerning its arrests of blacks, hispan-

ics and other persons of color. The statistics offered by plaintiff for the period beginning in 1981 (the year Alexander's commenced noting the race, color and ethnicity of the persons it arrested) showed that more than 70 percent of the arrests were of persons of color. Respondent showed for the year 1984, the percentage was 68 percent. Less than 1 percent of the losses from shoplifting accounted for those arrests so that there were no statistics or other information as to the reality of what race or color marked the majority of shoplifters.*

Evidence was further before the jury that petitioner was picked out for arrest

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* Respondent offered testimony at trial that Alexander's lost merchandise to shoplifters in an amount that averaged between $15,000,000 and $17,000,000 per annum. The recorded arrests of shoplifters in the store accounted for very little of this substantial loss.

and detained before the detective at Alexander's could know whether he was black, Hindu, Egyptian, hispanic, or of some other ethnicity.*

The arresting employee, Diaz, further gave no criteria for his preliminary decision to observe the Plaintiff when he first appeared as a customer in the store. He said, as to this that he would watch people who struck him as "suspicious," and he would decide this on "a case by case basis," giving no kind of standard for his conduct. He testified that he had kept the petitioner under surveillance for a long period of time before he decided to arrest him. Thus it is clear that Diaz chose to watch the

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* That petitioner's skin color was dark and he could be considered "black" was underlined in defense counsel's summation to the jury in which he argued that the jury should look carefully at the plaintiff and note that he could come from Bombay, India, or Egypt (A-120).

petitioner, who had dark skin, rather than someone else in the department store that day.

Respondent contends that the "only direct evidence" of discrimination against the Petitioner was that he was discriminated against because of "his Spanish extraction." This is not accurate; the color of the Petitioner's skin was directly before the jury. Petitioner's testimony that he was called a "Spic," concerned the employees' conduct after his initial arrest and during the arrest processing at which time the arresting employees were able to tell by his accent that he was hispanic rather than an Afro-American black.

Respondent further argues ingenuously, that no unfavorable inference supporting Petitioner's theory could be drawn from Alexander's keeping arrest

records showing the ethnic background and/or skin color of arrestees because other major retailers kept similar records. At trial and among the issues on appeal in the court below was plaintiff's claim of error as to the admission of evidence concerning the bookeeping policies of Macy's, Bloomingdales and Gimbels. Plaintiff objected to the admission of any evidence concerning other retail stores, since exploration of the question whether these other stores had practiced illegal discrimination against minorities identified by skin color could involve a mini-trial on an issue non-probative of Plaintiff's complaint against Alexander's on that ground.

Contrary to the Respondent's contention that Petitioner was given every opportunity to make his case because his

counsel was permitted to argue to the jury that the meaning that statistics showing that blacks and hispanics made up more than 70 percent of the roll of persons arrested by defendant, his counsel's argument was then made to appear foolish by the Court's instructions. Despite counsel's argument, the jury was restricted by the instructions the court gave on the issue to decide whether the policy was one of discriminating against hispanics only. The statistics and records were divided roughly to show 50 percent arrests of blacks and 20 percent arrests of hispanics. The 20 percent figure confined to hispanics only was not the overwhelming figure of 70 percent and accordingly it was inevitable that on the instructions given, the jury would rule for Respondent despite the clear and strong proof presented otherwise by

Petitioner.

Even though the trial court apparently understood Plaintiff's claim of the discriminatory policy alleged, which was supported by both pleadings and proof -- that Alexander's had an arrest policy targeting dark-skinned persons -- that court capriciously changed its mind and deprived the Plaintiff-Petitioner of his due process right to have the jury decide the constitutional issue he posed. The court below misapprehended the issue which is now ripe for review by this Court.

CONCLUSION

This Court should grant the writ of certiorari to hear the two issues set forth in the Petition.

Dated: July 25, 1991

Respectfully submitted,

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